Gan Chee Hui v Aspire Causeway Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO WA-25–31–01 OF 2022
AMARJEET SINGH J
24 MARCH 2023

Civil Procedure — Judicial review — Application for — Tribunal of Homebuyer Claims dismissed applicant's application for liquidated ascertained damages — Tribunal decided extension of time given by Controller of Housing under reg 11(3) of Housing Development (Control and Licensing) Regulations 1989 valid — Applicant filed judicial review application to quash tribunal's award — Whether for purpose of claiming liquidated ascertained damages time began to run when booking fee was paid — Whether reg 11(3) of Housing Development (Control and Licensing) Regulations 1989 ultra vires Housing Development (Control and Licensing) Act 1966 — Whether doctrine of estoppel could operate to defeat clear statutory provisions of law — Whether applicant entitled to liquidated ascertained damages — Whether tribunal committed error of law in applying estoppel — Whether tribunal committed an error of law in not granting liquidated ascertained damages to applicant — Whether award of tribunal was irrational — Whether award of tribunal ought to be quashed — Housing Development (Control and Licensing) Act 1966 — Housing Development (Control and Licensing) Regulations 1989 reg 11(3) — Rules of Court 2012 O 53 — Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 s 35(1)

The first respondent was a developer and vendor in a housing project whereas the applicant was the purchaser of a property in the said project. The first respondent had obtained an extension of 12 months from the Controller of Housing under reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('the 1989 Regulations') to complete the project. Such extension had resulted in period of the delivery of vacant possession and completion of the common facilities under cll 25(1) and 29(1) of the sale and purchase agreements ('the SPA') to be modified from the prescribed period stated in Schedule H of the 1989 Regulations from the statutory 36 months to 48 months. The applicant then filed a claim in the Tribunal for Homebuyer Claims Johor Bahru ('the tribunal') for liquidated ascertained damages ('the LAD') amounting to RM50,000 for the extended period excluding the period from 18 March 2020 to 31 July 2020 pursuant to s 35(1) of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('the COVID-19 Act'). In support of his claim, the applicant relied on the Federal Court's decision in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1

MLJ 281 ('Ang Ming Lee') and argued that the extension of 12 months was illegal and the statutory 36 months provided in Schedule H of the 1989 Regulations could not be altered to 48 months. The tribunal had dismissed the applicant's claim premised on the following reasons: (a) the time for the purpose of calculating LAD began from 27 August 2016, the date the booking fee was paid and not the date stated in the SPA; (b) the decision in the case of *Ang Ming Lee* was distinguished and the tribunal accepted the said extension of time; and (c) the applicant was not entitled to refer the issue of LAD to the tribunal for redress in view of the final settlement reached between the parties for the sum of RM4,616.90 as per Letter of Authorisation dated 28 August 2020 ('the letter of authorisation'). In the present judicial review application, the grounds advanced in the statement under O 53 of the Rules of Court 2012 in challenging the decision of the tribunal were as followed: (i) the tribunal committed an error of law in distinguishing *Ang Ming Lee* which had declared reg 11(3) of the 1989 Regulations ultra vires the Housing Development (Control and Licensing) Act 1966 ('Act 118'); and (ii) the tribunal committed an error of law in depriving the applicant of the LAD that was claimed.

Held, allowing an order of certiorari to quash the award of the tribunal and awarding the LAD of RM50,000 as claimed:

(1) It was trite law that the decision of an inferior tribunal may be reviewed on the grounds of 'procedural impropriety', 'illegality', 'irrationality' and where applicable 'proportionality'. Generally, judicial review was concerned with the decision-making process and the court was not permitted to go into the merit of the decision. However, when the ground relied on was 'illegality' and/or 'irrationality' the court was permitted to scrutinise the decision not only for process but also for substance. These two grounds allowed the courts to go into the merit of the matter. It was also trite that an inferior tribunal had no jurisdiction to commit an error of law. An error of law would be disclosed if the decision-maker: (a) asked himself the wrong question; (b) committed an unreasonableness error ie, took into account irrelevant considerations or omitted to take into account relevant considerations; (c) misconstrued the provision of any relevant statute; or (d) misapplied or mis-stated a principle of the general law. The other type of unreasonableness error was where the impugned decision was so unreasonable that no reasonable authority could ever have come to such decision (see paras 16–17).

(2) Based on the Federal Court's decision in the case of *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60, time began to run from the date of payment of the booking fee or deposit if earlier than the date stated on the sale and purchase agreement. The tribunal had applied the correct law that was binding on it. Therefore, for the purpose of the LAD claim in the present case, time

began from 27 August 2016 which was the date the booking fee was paid (see paras 18–19).

(3) The tribunal was bound by the decision of the Federal Court in the case of *Ang Ming Lee* which had declared that reg 11(3) of the 1989 Regulations which conferred on the Controller of Housing the powers to waive or modify any of the terms of the Schedule H of the sale and purchase agreement ultra vires its enabling legislation, Act 118. The effect of the declaration was that the Controller of Housing had no powers whatsoever to extend the statutory period prescribed in Schedule H of the 1989 Regulations. As such, it was inconsequential that the extension in the instant case was obtained before the execution of the SPA. The bottom line was that any extension allowed by the Controller of Housing under reg 11(3) of the 1989 Regulations was void and of no effect. In the circumstances, the tribunal had clearly committed an error of law in failing to apply the decision of *Ang Ming Lee* which was clearly binding on it. Therefore, the award of the tribunal was irrational on this ground (see paras 23–25, 27 & 29).

(4) It was settled law that an ultra vires legislation, such as reg 11(3) of the 1989 Regulations could not legitimise the extended period granted by the Controller of Housing through estoppel, waiver or even agreement between parties. The doctrine of estoppel, being an equitable principle, did not apply against legislation or a statutory sale and purchase agreement as in the present case. Since the applicant's claim was based on the statutory sale and purchase agreement, estoppel could not operate to defeat clear statutory provisions of law. Therefore, the application of estoppel was an error of law on the part of the tribunal (see paras 31–33).

(5) Based on the evidence, the letter of authorisation had nothing to do with the LAD payment and to hold as such would be perverse to the language employed therein. The tribunal clearly committed an error of law on the ground of irrationality. The decision on this point was one that a reasonable tribunal similarly circumstanced would not have made. If there was a settlement it must be clear and unambiguous. The applicant could not be deprived of his LAD which was a statutory right given to house buyers. The house buyer must be protected from housing developers as in the present case where the letter of authorisation was for something other than LAD (see paras 39–40).

(6) The applicant was in law entitled to claim LAD. In this case, the statutory period of 36 months was not displaced by the void extension of time of 12 months. The applicant could not be deprived of his LAD which was to be calculated using the following dates: (a) date of booking fee ie, 27 August 2016; (b) the 36 months which expired on 27 August 2019; and (c) the date of vacant possession ie, 1 August 2020. In the circumstances, the applicant was entitled to LAD from 28 August 2019

to 17 March 2020 (taking into consideration the days excluded by the COVID-19 Act). As such the tribunal committed an error of law in not granting the applicant's claim for LAD amounting to RM50,000 (see paras 41–42).

[Bahasa Malaysia summary

Responden pertama adalah pemaju dan vendor dalam sebuah projek perumahan manakala pemohon adalah pembeli hartanah dalam projek tersebut. Responden pertama telah mendapat lanjutan 12 bulan daripada Pengawal Perumahan di bawah peraturan 11(3) Peraturan-Peraturan Pembangunan Pemajuan (Kawalan dan Pelesenan) 1989 ('Peraturan 1989') untuk menyiapkan projek tersebut. Pelanjutan tersebut telah menyebabkan tempoh penyerahan pemilikan kosong dan penyiapan kemudahan bersama di bawah klausa 25(1) dan 29(1) perjanjian jual beli ('SPA') diubah suai daripada tempoh yang ditetapkan dalam Jadual H Peraturan 1989 iaitu tempoh berkanun 36 bulan kepada 48 bulan. Pemohon kemudiannya memfailkan tuntutan di Tribunal Tuntutan Pembeli Rumah Johor Bahru ('tribunal tersebut') untuk ganti rugi tertentu dan ditetapkan ('LAD') berjumlah RM50,000 untuk tempoh lanjutan tersebut tidak termasuk tempoh dari 18 Mac 2020 hingga 31 Julai 2020 menurut s 35(1) Akta Langkah-Langkah Sementara Bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (COVID-19) 2020 ('Akta COVID-19'). Bagi menyokong tuntutannya, pemohon bergantung kepada keputusan Mahkamah Persekutuan dalam *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee') dan berhujah bahawa lanjutan 12 bulan tersebut adalah menyalahi undang-undang dan 36 bulan berkanun yang diperuntukkan dalam Jadual H Peraturan 1989 tidak boleh diubah kepada 48 bulan. Tribunal tersebut telah menolak tuntutan pemohon berdasarkan alasan-alasana berikut: (a) masa bagi tujuan pengiraan LAD bermula dari 27 Ogos 2016, tarikh yuran tempahan dibayar dan bukan tarikh yang dinyatakan dalam SPA; (b) keputusan dalam kes *Ang Ming Lee* telah dibezakan dan tribunal menerima lanjutan masa tersebut; dan (c) pemohon tidak berhak merujuk isu LAD kepada tribunal untuk mendapatkan ganti rugi mengambil kira penyelesaian muktamad yang dicapai antara pihak-pihak untuk jumlah RM4,616.90 seperti dalam Surat Kebenaran bertarikh 28 Ogos 2020 ('surat kebenaran tersebut'). Dalam permohonan semakan kehakiman semasa, alasan-alasan yang dikemukakan dalam pernyataan di bawah A 53 Kaedah-Kaedah Mahkamah 2012 dalam mencabar keputusan tribunal tersebut adalah seperti berikut: (i) tribunal melakukan kekhilafan undang-undang dalam membezakan *Ang Ming Lee* yang telah mengisytiharkan peraturan 11(3) Peraturan 1989 ultra vires Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('Akta 118'); dan (ii) tribunal melakukan kekhilafan undang-undang dalam menafikan tuntutan LAD pemohon.

Diputuskan, membenarkan perintah certiorari untuk membatalkan award tribunal dan mengawardkan LAD berjumlah RM50,000 seperti yang dituntut:

(1) Adalah menjadi undang-undang yang mantap bahawa keputusan tribunal bawahan boleh disemak semula atas alasan 'ketidakaturan prosedur', 'tidak wajar', 'tidak rasional' dan di mana berkenaan 'perkadaran'. Secara amnya, semakan kehakiman adalah berkenaan dengan proses membuat keputusan dan mahkamah tidak dibenarkan untuk mengambil kira merit keputusan tersebut. Walau bagaimanapun, apabila alasan yang disandarkan adalah 'tidak sah' dan/atau 'tidak rasional' mahkamah dibenarkan untuk meneliti keputusan tersebut bukan sahaja untuk proses tetapi juga untuk kandungannya. Kedua-dua alasan ini membenarkan mahkamah membincangkan merit perkara tersebut. Ia juga sudah ditetapkan bahawa tribunal bawahan tidak mempunyai bidang kuasa untuk melakukan kekhilafan undang-undang. Kekhilafan undang-undang akan didedahkan jika pembuat keputusan: (a) bertanya kepada dirinya sendiri soalan yang salah; (b) melakukan kekhilafan yang tidak munasabah iaitu, mengambil kira pertimbangan yang tidak relevan atau meninggalkan untuk mengambil kira pertimbangan yang relevan; (c) salah tafsir peruntukan mana-mana statut yang berkaitan; atau (d) menyalahgunakan atau salah menyatakan prinsip undang-undang am. Jenis kekhilafan yang tidak munasabah yang lain adalah di mana keputusan yang dipertikaikan adalah sangat tidak munasabah sehingga tiada pihak berkuasa yang munasabah boleh membuat keputusan sedemikian (lihat perenggan 16–17).

(2) Berdasarkan keputusan Mahkamah Persekutuan dalam kes *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60, masa mula berjalan dari tarikh pembayaran yuran tempahan atau deposit jika tarikh tersebut lebih awal daripada tarikh yang dinyatakan dalam perjanjian jual beli. Tribunal telah menggunakan undang-undang yang betul yang mengikatnya. Oleh itu, bagi tujuan tuntutan LAD dalam kes ini, masa bermula dari 27 Ogos 2016 iaitu tarikh yuran tempahan dibayar (lihat perenggan 18–19).

(3) Tribunal terikat dengan keputusan Mahkamah Persekutuan dalam kes *Ang Ming Lee* yang telah mengisytiharkan bahawa peraturan 11(3) Peraturan 1989 yang memberikan kuasa kepada Pengawal Perumahan untuk mengetepikan atau mengubah suai mana-mana terma dalam Jadual H perjanjian jual beli ultra vires perundangan induknya, Akta 118. Kesan pengisytiharan tersebut ialah Pengawal Perumahan tidak mempunyai apa-apa kuasa pun untuk melanjutkan tempoh berkanun yang ditetapkan dalam Jadual H Peraturan 1989. Oleh itu, adalah tidak penting bahawa lanjutan dalam kes semasa diperolehi sebelum pelaksanaan SPA. Apa yang penting ialah apa-apa lanjutan yang

dibenarkan oleh Pengawal Perumahan di bawah peraturan 11(3) Peraturan 1989 adalah terbatal dan tidak berkuat kuasa. Dalam keadaan tersebut, tribunal jelas melakukan kekhilafan undang-undang kerana gagal mengguna pakai keputusan *Ang Ming Lee* yang jelas mengikatnya. Oleh itu, keputusan tribunal adalah tidak rasional atas alasan ini (lihat perenggan 23–25, 27 & 29).

(4) Sudah menjadi undang-undang yang mantap bahawa perundangan yang ultra vires, seperti peraturan 11(3) Peraturan 1989 tidak boleh mengesahkan tempoh lanjutan yang diberikan oleh Pengawal Perumahan melalui estoppel, penepian atau perjanjian antara pihak. Doktrin estoppel, sebagai prinsip yang saksama, tidak terpakai terhadap perundangan atau perjanjian jual beli berkanun seperti dalam kes ini. Memandangkan tuntutan pemohon adalah berdasarkan perjanjian jual beli berkanun, estoppel tidak boleh beroperasi untuk menafikan peruntukan undang-undang berkanun yang jelas. Oleh itu, pemakaian estoppel merupakan kekhilafan undang-undang di pihak tribunal (lihat perenggan 31 & 33).

(5) Berdasarkan keterangan, surat kebenaran tersebut tidak ada kaitan dengan pembayaran LAD dan untuk memutuskan sedemikian adalah bertentangan dengan bahasa yang digunakan di dalam surat tersebut. Tribunal jelas melakukan kekhilafan undang-undang atas alasan tidak rasional. Keputusan mengenai perkara ini adalah keputusan yang tidak akan dibuat oleh tribunal yang munasabah dalam keadaan yang sama. Sekiranya terdapat penyelesaian, ia mesti jelas dan tidak samar-samar. Pemohon tidak boleh dinafikan LAD-nya yang merupakan hak berkanun yang diberikan kepada pembeli rumah. Pembeli rumah mesti dilindungi daripada pemaju perumahan seperti dalam kes semasa di mana surat kebenaran tersebut adalah untuk sesuatu yang tidak berkaitan dengan LAD (lihat perenggan 39–40).

(6) Berdasarkan undang-undang, pemohon berhak menuntut LAD. Dalam kes ini, tempoh berkanun selama 36 bulan tersebut tidak digantikan oleh lanjutan masa yang tidak sah selama 12 bulan tersebut. Pemohon tidak boleh dinafikan LADnya yang dikira menggunakan tarikh berikut: (a) tarikh yuran tempahan iaitu, 27 Ogos 2016; (b) 36 bulan yang tamat pada 27 Ogos 2019; dan (c) tarikh pemilikan kosong iaitu, 1 Ogos 2020. Dalam keadaan tersebut, pemohon berhak mendapat LAD dari 28 Ogos 2019 hingga 17 Mac 2020 (dengan mengambil kira hari yang dikecualikan oleh Akta COVID-19). Oleh itu, tribunal melakukan kekhilafan undang-undang kerana tidak membenarkan tuntutan pemohon untuk LAD berjumlah RM50,000 (lihat perenggan 41–42).]

Cases referred to

Alpine Return Sdn Bhd v Matthew Ng Hock Sing & Ors [2021] MLJU 1923; [2022] 1 CLJ 120, HC (refd)

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2020] 1 CLJ 162, FC (refd)

Khoo Soon Lee Realty Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors [2020] MLJU 989; [2020] 1 LNS 881, HC (refd)

Loh Tina & Ors v Kemuning Setia Sdn Bhd & Ors and another appeal [2020] 6 MLJ 191; [2020] 7 CLJ 720, CA (refd)

PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor [2016] 5 MLJ 1; [2016] 7 CLJ 823, FC (folld)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

UE E&C Sanjia (M) Sdn Bhd v Lee Jeng Yuh & Anor and another appeal [2021] 6 MLJ 864; [2021] 10 CLJ 271, CA (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966 s 16N(2)

Housing Development (Control and Licensing) Regulations 1989 reg 11(3), Schedule H

Rules of Court 2012 O 53

Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 s 35(1), (4)

Alec Lim Chaw Chen (Alec Lim & Assoc) for the applicant.
Lai Chee Hue (with Ooi Xin Yi) (Chee Hoe & Assoc) for the respondent.

Amarjeet Singh J:

INTRODUCTION

[1] On 12 December 2022, I allowed an order of certiorari to quash the award of the Tribunal for Homebuyer Claims Johor Bahru (the first respondent referred to as 'the Tribunal') dated 10 November 2021. The Tribunal had dismissed the claim of the applicant, Gan Chee Hui for liquidated ascertained damages ('LAD') under a sale and purchase agreement against the first respondent, Aspire Causeway Sdn Bhd. The consequential order following the

dismissal was to award the LAD amounting to RM50,000 that was claimed before the Tribunal. A

[2] This judgment contains the full reasons for my decision.

BACKGROUND FACTS B

[3] The first respondent is the developer and vendor of a housing project known as Nidoz Residences @ Desa Petaling (also known as 'Residensi Bayan Desa Petaling' and hereinafter referred to as 'the project'). On 25 May 2016, the first respondent obtained an extension of 12 months to complete the project from the Controller of Housing under reg 11(3) of the Housing Development (Control and Licensing) Regulations 1989 ('the 1989 Regulations'). The extension resulted in the delivery of vacant possession and completion of the common facilities under the sale and purchase agreements to be modified from the prescribed period stated in Schedule H of the 1989 Regulations from the statutory 36 months to 48 months. C D

[4] On 27 August 2016, the applicant signed a pro-forma sale and purchase to purchase a parcel known as No D-29–06 at level 29 of Tower D of the project for RM838,700. He also paid a booking fee of RM5,000 as required by the first respondent. The sale and purchase agreement was executed by the parties on 27 October 2016 and thereafter the purchase price was paid in full by the applicant. The last date to deliver vacant possession and the completion of the common facilities was 27 August 2020 from the date the booking fee was paid, taking 48 months as agreed by the parties in the sale and purchase agreement. Otherwise, the last date would have been 27 August 2019 if the extension of 12 months was not granted by the Controller of Housing. E F

[5] On 2 July 2020, the first respondent issued a notice of vacant possession requesting the applicant to take delivery of the said parcel. Both parties were on common ground that vacant possession was delivered and the common facilities completed on 1 August 2020. G

[6] On 23 August 2021, the applicant filed a claim for LAD before the Tribunal amounting to RM 50,000 against the first respondent. The breakdown of the LAD claim was as follows: H

(a) LAD for late delivery of the parcel from 28 August 2019 to 17 March 2020 under cl 25(2) of the sale and purchase agreement (all clauses referred to refer to the sale and purchase agreement), excluding the period from 18 March 2020 to 31 July 2020 pursuant to s 35(1) of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('the COVID-19 Act') amounting to RM46.645.34 (ie 203 days at RM229.78 per day); and I

(b) LAD for late delivery of the common facilities from 28 August 2019 to 17 March 2020 under cl 29(2) excluding the period from 18 March 2020 to 31 July 2020 pursuant to s 35(1) of the COVID-19 Act amounting to RM9,329.88 (ie 203 days at RM45.96 per day).

[7] The total LAD claim for the late delivery of vacant possession of the parcel and completion of the common facilities was RM55,975.22. The applicant abandoned RM5.975.22 from the said amount and claimed only RM50,000 from the first respondent before the Tribunal. The applicant claimed the LAD on the basis that the extension of 12 months granted by the Controller of Housing was illegal and the statutory 36 months provided in Schedule H of the 1989 Regulations 1989 cannot be altered to 48 months based on the decision of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162.

[8] The first respondent's defence before the Tribunal was pleaded as follows:

(a) there was no delay in the delivery of vacant possession and the completion of the common facilities and therefore the calculation of the LAD is unjustified and invalid. Vacant possession was delivered on 2 July 2020 which was within the time frame stipulated in cll 25(1) and 29(1), after approval had been obtained from the Ministry of Housing and Local Government to extend time therein from 36 months to 48 months, from 27 October 2016 which is the date of the sale and purchase agreement;

(b) the Tribunal has no jurisdiction to question the validity of the modification to cll 25(1) and 29(1) as a result of the approval granted by the Controller of Housing and whether the date of calculating the LAD begins from the date of deposit or the date of the sale and purchase agreement and must only adhere to the date of the agreement.

(c) the first responded was granted exemption of 167 days, that is to say, from 18 March 2020 to 31 August 2020 for the calculation of the LAD under the sale and purchase agreement under s 35(1) and 35(4) of the COVID-19 Act; and

(d) the purchase price should be the price after rebate otherwise it amounts to unjust enrichment. At the time of delivery of vacant possession 1% rebate or RM8,387.00 was accepted by the applicant and that, 'the sum of RM4,616.90 (after the deductions of the progressive claim, service charge, sinking fund and other miscellaneous charges ('deductions') were paid to the claimant on 10 November 2020 and there were no grievances,

contest, claim and disputes raised by the claimant on late delivery on late delivery of vacant possession of the parcel at the time of the claimant enjoyed the said rebate'.

[9] On 10 November 2021, the Tribunal dismissed the claim for the LAD which caused the applicant on 20 January 2022 to file the instant judicial review application.

THE DECISION OF THE TRIBUNAl

[10] The chairman of the Tribunal decided the claim on three issues as follows: (a) whether time begins to run on the date of the deposit or date of the agreement; (b) whether the extension of time granted by the Controller of Housing from 36 months to 48 months is to be taken into account when calculating the LAD; and (c) whether the applicant is entitled to refer the matter to the Tribunal in view of the settlement reached between the parties as per Letter of Authorisation dated 28 August 2020.

[11] On issue (a) the Tribunal followed the Federal Court decision in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60 and decided that the time for the purpose of calculating LAD begins from 27 August 2016, the date the booking fee was paid and not the date stated on the sale and purchase agreement.

[12] On issue (b) the Tribunal followed the decision of the High Court in *Alpine Return Sdn Bhd v Matthew Ng Hock Sing & Ors* [2021] MLJU 1923; [2022] 1 CLJ 120 which had distinguished *Ang Ming Lee.* The Tribunal decided that the date of delivery of vacant possession of the parcel and the completion of the common facilities was 48 months as agreed by the parties in cll 25(1) and 29(1). In this regard, the Tribunal accepted the extension of time granted by the Controller of Housing under reg 11(3) of the 1989 Regulations and the normal contract law for the purpose of calculating the LAD.

[13] The applicant was also estopped from reneging from the terms of the said sale and purchase agreement as all parties were under the belief that the extension of time granted was validly given at the material time.

[14] On issue (c) it was decided that the applicant was not entitled to refer the issue of LAD to the Tribunal for redress in view of the final settlement reached between the parties for the sum of RM4,616.90 as per letter of authorisation dated 28 August 2020. The case of *Khoo Soon Lee Realty Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors* [2020] MLJU 989; [2020] 1 LNS 881 was cited in support.

THE GROUNDS CHALLENGING THE DECISION OF THE TRIBUNAL

[15] The grounds advanced in the O 53 statement challenging the decision of the Tribunal can be summarised as follows:

(a) the Tribunal committed an error of law in distinguishing *Ang Ming Lee* which had declared reg 11(3) of the 1989 Regulations ultra vires the Housing Development (Control and Licensing) Act 1966; and

(b) the Tribunal committed an error of law in depriving the applicant of the LAD that was claimed.

ANALYSIS AND DECISION

[16] It is trite law that the decision of an inferior tribunal may be reviewed on the grounds of 'procedural impropriety, 'illegality', 'irrationality' and where applicable 'proportionality'. Generally, judicial review is concerned with the decision-making process and the court is not permitted to go into the merit of the decision.

However, when the ground relied is 'illegality' and/or 'irrationality' the court is permitted to scrutinise the decision not only for process but also for substance. These two grounds allow the courts to go into the merit of the matter (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 and *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629.

[17] It is also trite that an inferior tribunal has no jurisdiction to commit an error of law. An error of law would be disclosed if the decision-maker: (i) asks himself the wrong question; (ii) commits an unreasonableness error ie takes into account irrelevant considerations or omits to take into account relevant considerations; (iii) misconstrues the provision of any relevant statute; (iv) or misapplies or mis-states a principle of the general law. The other type of unreasonableness error is where the impugned decision is so unreasonable that no reasonable authority could ever have come to such decision (see *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748).

When does time begin to run for the purposes of the LAD

[18] The law on this issue is trite and settled by the Federal Court in *PJD Regency Sdn Bhd*. Time begins to run from the date of payment of the booking fee or deposit if earlier than the date stated on the sale and purchase agreement.

[19] The Tribunal applied the correct law that was binding on it. Thus, for the purpose of the LAD claim in the instant case, time begins from 27 August 2016 which is the date the booking fee was paid.

Modified period to 48 months in cll 25(1) and 29(1) invalid

[20] The claim before the Tribunal is for LAD based on the sale and purchase agreement entered between the applicant and the first respondent to purchase a parcel in the project. The jurisdiction to hear this type of claim is specifically conferred on the Tribunal pursuant to s 16N(2) of the Housing Development (Control and Licensing) Act 1966. The sale and purchase agreement is unique as it is statutorily prescribed in Schedule H of the 1989 Regulations. The terms of this agreement include clauses in the form of cll 25(1) and 29(1) which are under consideration in the instant judicial review proceedings. The statutory period prescribed for the delivery of vacant possession and the completion of the common facilities is 36 months.

[21] Prior to entering into the sale and purchase agreement the first respondent obtained an extension of 12 months to complete the project, based on various reasons, from the Controller of Housing under reg 11(3) of the 1989 Regulations. As a result, when the sale and purchase agreement was entered into the period stated in cll 25(1) and 29(1) were modified to 48 months.

[22] Vacant possession was given and common facilities were completed on 1 August 2020. The Tribunal found the defence of no delay proven based on the 12 months extension granted by the Controller of Housing together with the excluded 167 days from 18 March 2020 to 31 August 2020 given under the COVID-19 Act. As alluded to earlier, the Tribunal followed the reasoning given in the case of *Alpine Return Sdn Bhd* where the case of *Ang Ming Lee* was distinguished.

[23] *Ang Ming Lee* which was decided on 26 November 2019 had declared that reg 11(3) of the 1989 Regulations which confers on the Controller of Housing the powers to waive or modify any of the terms of the Schedule H sale and purchase agreement ultra vires its enabling legislation, the Housing Development (Control and Licensing) Act 1966. The effect of the declaration was that the Controller of Housing has no powers whatsoever to extend the statutory period prescribed in Schedule H of the 1989 Regulations.

[24] As such, it was inconsequential that the extension in the instant case was obtained before the execution of the sale and purchase agreement. The bottom line is that any extension allowed by the Controller of Housing under reg 11(3) of the 1989 Regulations is void and of no effect.

[25] The Tribunal was clearly bound by the decision of *Ang Ming Lee* which is aptly encapsulated in the following paragraphs of the judgment:

> [55] Finally, on the third task. In the instant appeals, the Schedule H contract of sale prescribed by the Regulations is to carry into effect the provisions of the Act, which is to protect the interests of the purchasers. The regulations made by the Minister must thus achieve the object of protecting the interests of the purchasers and not the interests of the developers. And at the risk of repetition, the duty to protect the interests of the purchasers is entrusted to the Minister.
>
> [56] By delegating the power, vide reg 11(3) to the Controller to waive or modify the prescribed terms and conditions of the sale of contract, it is now the Controller who has been entrusted to regulate the terms and conditions of the contract of sale. Further, by modifying the prescribed terms and conditions and by granting the developer the extension of time, the Controller has denied the purchasers' right to claim for LAD. This modification and the granting of extension of time to the developer, does not appear to us to protect or safeguard the purchasers but rather the developer and this militates the intention of Parliament.
>
> [57] It was submitted for the developer that the purchasers would suffer greater hardship if the project is not completed as compared to not being able to claim for LAD. With respect, we fail to see the merit of this submission. If the developer fails to obtain an extension of time to deliver vacant possession, that in itself does not mean that the developer has failed to complete and hence, have abandoned the project. Whether or not the developer is granted an extension of time does not necessarily determine the fate of the project. The extension of time only determines payment of LAD. In this regard, we must not lose sight of the purchasers' obligations to pay for progress instalment to their respective housing financier and/or payment of rental to their landlord. It is a matter of balancing the commercial interest of a multi-million housing development company against the life-time loan commitment of a purchaser for a basic living necessity. As can be seen from the long line of authorities, it is the interests of the purchasers that prevail over that of the developer. We therefore hold that in allowing the Controller to waive or modify the terms and conditions of the contract of sale and in the process, denying the purchasers' right to claim for LAD as prescribed by the Minister under Schedule H, reg 11(3) does not comply with the description of the Regulations which is designed to protect the interests of the purchasers.

[26] Further, in *Ang Ming Lee* the Federal Court construed the Housing Development (Control and Licensing) Act 1966 as a social legislation. The underlying intention of such legislation is to protect the interests of the house buyers, as the weaker parties in the statutory sale and purchase agreement. The principle concerning the legislation being a social legislation was is expounded in the following paragraph of the judgment:

> [40] The Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer. Parliament has entrusted the Minister to safeguard the interests of the purchasers and the Minister has prescribed the terms and conditions of the contract

of sale as per Schedule H. We find no contrary indication in the language, scope or object of the Act that such duty to safeguard the interests of the purchasers may be delegated to some other authority.

[27] The Tribunal was bound to follow the decision of *Ang Ming Lee.* The extension of 12 months, although granted on 25 May 2016 by the Controller of Housing under regulation 11(3) of the 1989 Regulations which modified cll 25(1) and 29(1) from 36 months to 48 months was by virtue of the decision void and of no effect.

[28] In *UE E&C Sanjia (M) Sdn Bhd v Lee Jeng Yuh & Anor and another appeal* [2021] 6 MLJ 864; [2021] 10 CLJ 271 the Court of Appeal held that the decision in *Ang Ming Lee* made it clear that the Controller of Housing has no power whatsoever to waive and modify the terms of the statutory sale and purchase agreement and therefore the issue whether the approval was obtained before or after the sale and purchase agreement was executed is not relevant. Further, in absence of clear pronouncement the declaration in *Ang Ming Lee* on reg 11(3) of the 1989 Regulations being void is to be applied retrospectively.

[29] In the circumstances, the Tribunal had clearly committed an error of law in failing to apply the decision of *Ang Ming Lee* which was clearly binding on it. Thus, the award of the tribunal is irrational on this ground.

Estoppel not applicable

[30] It was argued as a legal point that the Tribunal was estopped from going outside the four corners of the sale and purchase agreement and must construe the provisions as they stand. In other words, the Tribunal must accept that the period stated in cll 25(1) and 29(1) ie 48 months as agreed by the parties. As alluded to in the preceding paragraphs such interpretation would be against the decision in *Ang Ming Lee.*

[31] It is settled law that an *ultra vires* legislation, such as reg 11(3) of the 1989 Regulations cannot legitimise the extended period granted by the Controller of Housing through estoppel, waiver or even agreement between parties. The doctrine of estoppel, being an equitable principle, does not apply against legislation or a statutory sale and purchase agreement as in the instant case. Since the applicant's claim is based on the statutory sale and purchase agreement, estoppel cannot operate to defeat clear statutory provisions of law. The case of *Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor* [2016] 5 MLJ 1; [2016] 7 CLJ 823) is instructive. There it was held as follows:

[57] The issue of estoppel was also raised by the defendant. The defendant argued that the first plaintiff had accepted the defendant's payment of the full purchase

price for all the 12 shop lots and never evinced any intention to refund the same. By that conduct, the defendant claimed that the first plaintiff was estopped from relying on s 293 of the CA as an instrument of fraud to prevent the defendant from receiving the properties which it had paid for.

[58] Our view is that the plaintiffs' claim is based on statutory provisions of s 293 of the CA read together with s 52 of the BA. These statutory provisions, as we have discussed earlier, are clear and unambiguous. Estoppel, being an equitable principle cannot operate to defeat clear statutory provisions of law.

[32] In *Loh Tina & Ors v Kemuning Setia Sdn Bhd & Ors and another appeal* [2020] 6 MLJ 191; [2020] 7 CLJ 720 the Court of Appeal held as follows:

[88] In any event estoppel does not operate against a statute or statutory form of contract. See the Federal Court case of *Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals* [2018] 3 ML J 141; [2018] 3 MLRA 1 at paras [103] and [105].

[33] Thus, the application of estoppel was an error of law on part of the Tribunal as its application defeated the purpose of the Housing Development (Control and Licensing) Act 1966 and legislation made thereunder as a social legislation enacted to control housing development and protect the interests of purchasers.

Estoppel by settlement agreement

[34] The Tribunal found that the applicant had received a settlement sum of RM4,616.90 as final settlement of the LAD in what was termed as a 'settlement letter'. In the notes of proceedings of the Tribunal, the 'settlement letter' turned out to be a 'Letter of Authorisation' dated 28 August 2020 and in view of its importance the said letter is reproduced below:

LETTER OF AUTHORISATION

TO:

EXSIM GROUP OF COMPANIES

No. 18, lock 2, Jalil Link

Jalan Jalil Jaya, Bukit Jalil

50700 Kuala Lumpur

Dear Sirs,

RE: REFUND PAYMENT

PROJECT: NIDOZ RESIDENCES @ DESA PETALING (ALSO KNOWN AS 'RESIDENSI BAYAN DESA PETALING')

PARCEL NO. : D-29-06

I/We, the purchaser(s) of the abovementioned property hereby authorise you to transfer the amount *RM4,616.90* being refund of deposit/excess payment/booking fee /reimbursement to the following bank account:-

(Particulars of Bank and Bank Account Number)

I/We, hereby irrevocably and unconditionally agree and undertake to fully indemnify and hold you harmless against any and all demands, claims or actions whatsoever or howsoever arising out of or otherwise in connections with the arrangements set out therein or any damages, costs, expenses, losses or liabilities whatsoever incurred or suffered by you from or in connection with or consequential to you having agreed to and carried out the aforesaid transaction in my favour/our favour. Any direct or indirect consequences arising from the above shall be my/our sole responsibility and I/We shall have no claims against you.

Dated this 28 day of August 2020

Signed by all the Purchaser(s) as

Set out in the Pro forma Sale & Purchase Form

*(1) _____ sgd _____

Name: GAN CHEE HUI

NRIC Passport No: 910716–04–5507

*(2) _____

Name:

NRIC Passport No:

(Kindly return the duly signed copy to nidoz_cc@exsim.my)

[35] This document is clearly a standard form document prepared by the first respondent for purchasers to sign and return to the e-mail address stated. The subject of the letter is 'Refund Payment in respect of Parcel No D-29–06' which parcel was purchased by the applicant. The refund is expressly stated being one or more of the following items: (i) deposit; (ii) excess payment; (iii) booking fee; (iv) reimbursement. The amount of RM4,616.90 being one or more of the stipulated items was already typed out. The 'Particulars of Bank' and 'Bank Account Number' was written by hand and signed by the applicant.

[36] The purpose of the letter of authorisation is self-explanatory from the words used, ie to authorise the first respondent to transfer the stated amount of RM4,616.90 to the designated bank and account number identified in writing by the applicant. That was the arrangement between the parties spelled out in the letter of authorisation. The letter also contained the usual provision to absolve any liability whatsoever and howsoever arising out of or otherwise in connection with the arrangements including any damages, costs, expenses,

losses or liabilities incurred or suffered by the first respondent as a result of having agreed to and carrying out the 'aforesaid transaction'.

[37] Now, the letter of authorisation was sent to the applicant in a letter dated 26 June 2020 which state as follows:

Date : 26/06/2020

GAN CHEE HUI

NO. 30, TAMAN SRI SAUJANA

JALAN KESANG,

84000 MUAR, JOHOR

Dear Sir/Madam

RE: Project: NIDOZ RESIDENCES @ DESA PETALING (ALSO KNOWN AS 'RESIDENSI BAYAN DESA PETALING')

Property: Condominium

Parcel No.: D-29-06

Purchaser(s): GAN CHEE HUI

We refer to the above matter and our *Delivery of Vacant Possession Statement* ('Statement').

We are pleased to inform that your entitlement on reimbursement upon delivery of vacant possession amounting to RM8,387.00 shall be utilised to contra with the outstanding sum as stated in the Statement.

Kindly be informed that after the said contra, the balance of reimbursement of RM4,616.90 shall be credited to your bank account upon receiving the duly completed and signed Letter of Authorisation, a copy of which is attached herewith for your action.

Thank you

Yours faithfully,

for ASPIRE CAUSEWAY SDN BHD (949516-M)

sgd

MICHELLE SIEW

Head of Corporate Communications

michelle.siew(5).exsim.my

[38] The above letter dated 26 June 2020 clearly shows that the said amount of RM4,616.90 was reimbursement less outstanding sum stated in the Statement and that was the amount to be credited to the applicant's bank

account upon the first respondent receiving the duly completed and signed Letter of Authorisation. The total reimbursement was from an amount of RM8,387.00 from progress payment made less RM3,770.10 being the items stated in the Invoice No Ml 10001172 dated 26 June 2020 which were due on 25 July 2020. This can be seen from the Delivery of Vacant Possession Statement dated 26 June 2020 which is reproduced below:

Date : 26/06/2020

GAN CHEE HUI

NO. 30, TAMAN SRI SAUJANA

JALAN KESANG,

84000 MUAR, JOHOR

Dear Sir/Madam

RE: *DELIVERY OF VACANT POSSESSION STATEMENT*

Project: RESIDENSI BAYAN DESA PETALING (also known as NIDOZ RESIDENCES @ DESA PETALING

Property: CONDOMINIUM

Parcel No.: D-29-06

P.D.(D/M) No.: Lot 102132

H.S.(D/M) No.: PN 52903

Selling Price: RM838,700.00

Loan Amount:RM754,830.00

Description	Financier (RM)	Purchaser (RM)
Total Progressive Payment Outstanding	251,610.00	(8,387.00)
Total Late Payment Charges Outstanding	0.00	0.00
Total Misc Charges Outstanding	0.00	(3770.10)

Please note that handing over the keys is subject to the full settlement of the purchase price (including your financier's portion) of the property plus any maintenance and late payment charges and/or hold by the vendor's solicitors as stakeholder for payment to the vendor in respect of stage completion.

Thank you

Yours faithfully,

ASPIRE CAUSEWAY SDN BHD (949516-M)

COMPUTER GENERATED FORM NEED NOT BEAR ANY SIGNATURE

[39] So, clearly the letter of authorisation had nothing to do concerning LAD payment and to hold as such would be perverse to the language employed therein. The Tribunal clearly committed an error of law on the ground of irrationality. The decision on this point was one that a reasonable Tribunal similarly circumstanced would not have made.

[40] If there is a settlement it must be clear and unambiguous. The applicant cannot be deprived of his LAD which is a statutory right given to house buyers. The house buyer must be protected from housing developers as in the instant case where the letter of authorisation is for something other than LAD.

The liquidated ascertained damages

[41] The applicant is in law entitled to claim LAD. In this case, as shown above, the statutory period of 36 months is not displaced by the void extension of time of 12 months. The applicant cannot be deprived of his LAD which is to be calculated using the following dates:

date of booking fee: 27 August 2016

36 months expire on: 27 August 2019

date of vacant possession: 1 August 2020

[42] In the circumstances, the applicant is entitled to LAD from 28 August 2019 to 17 March 2020 (taking into consideration the days excluded by the COVID-19 Act). As such the Tribunal committed an error of law in not granting the applicant LAD amounting to RM50,000 as claimed.

CONCLUSION

[43] In view of the above the applicant is entitled to an order of certiorari quashing the dismissal of the claim for LAD and a consequential order awarding the LAD of RM50,000 as claimed.

Order of certiorari to quash award of tribunal allowed; LAD of RM50,000 awarded as claimed.

Reported by Dzulqarnain Ab Fatar